



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2021-0643; FRL-9286-01-OAR]

Consideration of Negotiated Rulemaking for Petitions Granted or Partially Granted under Subsection (i) of the American Innovation and Manufacturing Act of 2020

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public of the Environmental Protection Agency's consideration of the negotiated rulemaking procedure provided for under the Negotiated Rulemaking Act of 1990, and the Agency's decision to not use these procedures for a rulemaking under subsection (i) of the American Innovation and Manufacturing Act of 2020 that will address ten petitions that were granted and one petition that was partially granted by the Agency under this subsection on October 7, 2021.

DATES: Petitions referenced in this notice were granted by the Administrator via letters signed on October 7, 2021; thus, EPA is required by statute to promulgate a final rule or rules by October 7, 2023.

FOR FURTHER INFORMATION CONTACT: Joshua Shodeinde, Stratospheric Protection Division, Office of Atmospheric Programs (6205T), Environmental Protection Agency, telephone number: 202-564-7037; email address: shodeinde.joshua@epa.gov. You may also visit EPA's website at <https://www.epa.gov/climate-hfcs-reduction> for further information.

SUPPLEMENTARY INFORMATION:

I. Background

On October 7, 2021, the Administrator granted or partially granted eleven petitions submitted under subsection (i) of the American Innovation and Manufacturing Act of 2020 (AIM

Act or Act).^{1,2} This subsection provides that the Administrator may by rule restrict, fully, partially, or on a graduated schedule, the use of a regulated substance³ in the sector or subsector in which the regulated substance is used. Under subsection (i)(3) a person may petition the Administrator to promulgate a rule for the restriction on use of a regulated substance in a sector or subsector which shall include a request that the Administrator negotiate with stakeholders in accordance with subsection (i)(2)(A). Where the Agency grants a petition submitted under subsection (i), the statute requires that EPA promulgate a final rule not later than two years from the date the Agency grants the petition. Prior to issuing a proposed rule under subsection (i) for the use of a regulated substance for a sector or subsector, subsection (i)(2)(A) directs EPA to consider negotiating with stakeholders in the sector or subsector subject to the potential rule in accordance with negotiated rulemaking procedures established under subchapter III of chapter 5 of title 5, United States Code (commonly known as the “Negotiated Rulemaking Act of 1990”). Under subsection (i)(2)(C), if the Administrator does not negotiate a rulemaking with stakeholders, the Administrator shall publish an explanation of the decision of the Administrator to not use that procedure. This notice provides that explanation of the Agency’s decision not to use a negotiated rulemaking for the rulemaking process that EPA plans to commence to address the eleven petitions that were granted or partially granted on October 7, 2021.

II. What is a negotiated rulemaking?

¹ The AIM Act was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260). In general terms, the AIM Act provides EPA authorities to address HFCs in three main areas: Phasing down the production and consumption of listed HFCs; managing these HFCs and their substitutes; and facilitating technology transitions by restricting use of these HFCs in the sector or subsector in which they are used.

² For a list of petitions granted or partially granted, see *Determination to Grant or Partially Grant Certain Petitions Submitted Under Subsection (i) of the American Innovation and Manufacturing Act of 2020*, 86 FR 57141 (October 14, 2021).

³ The Act provides that “regulated substance” refers to those substances included in the list in subsection (c)(1) of the Act and those substances that the Administrator has designated as a regulated substance under subsection (c)(3). Subsection (c)(1) lists 18 saturated HFCs, and by reference their isomers not so listed, as regulated substances. This is the current list of regulated substances, as no additional substances have been designated as regulated substances under subsection (c)(3).

The purpose of the Negotiated Rulemaking Act of 1990,⁴ as stated in 5 U.S.C. 561, is to establish a framework for the conduct of negotiated rulemaking to encourage agencies to use the process when it enhances the informal rulemaking process. The Negotiated Rulemaking Act authorizes an agency to establish a negotiated rulemaking committee to negotiate and develop a proposed agency rule if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the Negotiated Rulemaking Act provides that the head of the agency shall consider whether: (1) there is a need for a rule; (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and are willing to negotiate in good faith to reach a consensus on the proposed rule; (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time; (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule; (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

If a head of agency determines that the use of the negotiated rulemaking procedure is in the public interest, an agency may convene a federally chartered advisory committee, and may rely on an appointed convener under 5 U.S.C. 563(b) to assist with ascertaining the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule. If the agency decides to establish a negotiated rulemaking committee, the agency must publish in the *Federal Register* and in relevant publications a notice announcing the

⁴ The Negotiated Rulemaking Act of 1990 was reauthorized in 1996 and is now incorporated into the Administrative Procedure Act, at 5 U.S.C. §§ 561-570.

agency's intention to establish a negotiated rulemaking committee, a description of the subject and scope of the rule, a list of the interests which are likely to be significantly affected by the rule, a list of the persons proposed to represent such interests and the proposed agency representatives, a proposed agenda and schedule for completing the committee's work, a description of the administrative and technical support to be provided to the committee by the agency, a solicitation for comments on the proposal to establish the committee and on the proposed membership of the committee, and an explanation of how a person may apply or nominate another person for membership on the committee. The agency must provide at least 30 calendar days for the submission of comments and applications related to the membership of the committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act, unless an exception applies. If the committee reaches consensus on a proposed rule, the committee shall transmit a report containing the proposed rule to the federal agency. If the committee does not reach a consensus on a proposed rule, the committee may transmit a report specifying any areas upon which consensus was reached. The proposed rule is still subject to public comment, and for purposes of a rulemaking developed under the AIM Act, the requirements of CAA section 307(d).

Under the Negotiated Rulemaking Act, any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee shall not be subject to judicial review. 5 U.S.C. 570.

III. Petitioners' Statements on Use of Negotiated Rulemaking Procedures

All petitioners indicated their support for EPA not to use negotiated rulemaking procedures in developing a proposed rulemaking associated with their petitions, and to instead rely solely on a traditional notice-and-comment rulemaking process. Per AIM Act section (k)(1)(C) and CAA section 307(d)(1)(I), the rulemaking is governed by CAA section 307(d). Nearly all petitioners indicated that with regards to their petition requests, the negotiated rulemaking process is not needed and would not be efficient because many of the petition

requests have already undergone extensive stakeholder processes. For example, petitioners pointed out that in many cases, their requests align with changes of status decisions contained in EPA’s Significant New Alternatives Policy (SNAP) program’s rules 20 and 21⁵ and state HFC laws and regulations,⁶ and therefore the substantive requests in the petitions have already been vetted through federal or state rulemaking or legislative processes.⁷ Petitioners representing industry trade associations such as the American Chemistry Council’s Center for Polyurethane Industry, the Association of Home Appliance Manufacturers, and the Air Conditioning, Heating, and Refrigeration Institute indicate that their requests represent the consensus view of the vast majority of industry stakeholders who may be subject to compliance obligations based on their petitions. These petitioners assert that a negotiated rulemaking would provide no value for stakeholders, the public, and the potentially regulated community because a traditional notice-and-comment rulemaking provides “a suitably transparent and representative regulatory process.”⁸

Petitioners also note that a negotiated rulemaking may unnecessarily delay timely action by the Agency. Several petitions stress the need for quick action from the Agency in finalizing a rule to create a federal regulatory framework, maximize potential climate and environmental benefits, and to give industry sufficient time to prepare to transition away from using HFCs. These petitioners suggest that using negotiated rulemaking procedures requires more commitment of time and resources that may unnecessarily delay action.

⁵ After a court challenge, the D.C. Circuit partially vacated the SNAP Rule 20 “to the extent it requires manufacturers to replace HFCs with a substitute substance,” and remanded to EPA for further proceedings. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017). However, the court upheld EPA’s decisions in that rule to change the listings for certain HFCs in certain SNAP end-uses from acceptable to unacceptable as being reasonable and not arbitrary and capricious. *Id.* at 462-64. The same court later issued a similar partial vacatur for portions of the SNAP Rule 21. *See Mexichem Fluor, Inc. v. EPA*, 760 Fed. Appx. 6 (Mem) (per curiam) (D.C. Cir. 2019).

⁶ A number of states have established legislative and/or regulatory restrictions on the use of HFCs in sectors. These include California, Colorado, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Rhode Island, Virginia, Vermont, Washington.

⁷ See <https://ww2.arb.ca.gov/our-work/programs/hfc-reduction-measures/rulemaking>.

⁸ See, for example, the Association of Home Appliance Manufacturers and the Air Conditioning, Heating, and Refrigeration Institute petitions, available at <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0289-0005> and <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0289-0012>, respectively.

One petitioner raised concerns with protecting intellectual property (IP) and trade secrets if EPA uses a negotiated rulemaking.⁹ According to the petitioner, potential release of sensitive information would effectually block technology category-based discussions from occurring and thus could unnecessarily limit discussions as well as reach consensus.

IV. EPA's Considerations of Criteria under the Negotiated Rulemaking Act

The Negotiated Rulemaking Act of 1990, 5 U.S.C. 563, provides seven criteria that the head of the agency shall consider when determining whether a negotiated rulemaking is in the public interest. We think these criteria are informative for purposes of making the determination under AIM Act subsection (i) of whether to use the procedures set out in the Negotiated Rulemaking Act for the proposed rule or rules associated with the 11 granted and partially granted petitions. EPA's consideration of each criteria is described below.

Criteria (1) whether there is a need for a rule: the AIM Act requires that EPA promulgate a final rule in response to granted petitions under subsection (i) of the AIM Act.

Criteria (2) whether there are a limited number of identifiable interests that will be significantly affected by the rule: the petitions at issue request the EPA to promulgate restrictions on the use of HFCs in an array of applications across many industries that would affect residential and business consumers in the air conditioning, refrigeration, aerosols, and spray foams spaces. Because of the similarities in the granted petitions, EPA is considering consolidating the issues into significantly fewer than 11 separate rulemakings. We may also, as part of the anticipated rule or rules, consider additional issues not raised in the petitions. For example, initial rulemaking under subsection (i) may also address framework elements that are broader than what is covered by the petitions (e.g., definitions, applicability, recordkeeping). Given the nature of these particular petition requests and the anticipated scope of rulemaking, it

⁹ See DuPont comment letter submitted on August 9, 2021, available at <https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0289-0043>.

is unlikely that there are a “limited” number of identifiable interests; on the contrary, a significant number of entities are likely interested and may be impacted by forthcoming rules.

Criteria (3) whether there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and are willing to negotiate in good faith to reach a consensus on the proposed rule: EPA granted ten petitions and partially granted one other petition that covered over 40 applications in the refrigeration, air conditioning, foam, and aerosol sectors, with some petitions covering multiple applications. Although EPA has a long history working with a diverse group of stakeholders in all applications covered by the granted petitions under various CAA Title VI authorities (e.g., sections 608, 609, 610, 612), the broad range of applications would make it difficult to convene a committee that would be representative of all interested groups.

Criteria (4) whether there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time: Based on the information provided by petitioners in section III above, and letters of support submitted to the docket,¹⁰ there appears to be consensus among different interest groups to move forward with proposing HFC restrictions similar to those contained in petitions. However, there may also be entities potentially affected by proposed rules who have yet to indicate their interest to the Agency. Additionally, EPA has identified a few applications – specifically in industrial process refrigeration (without chillers) and chillers for industrial process refrigeration – where certain petitioners have requested different HFC restrictions. Therefore, it is not clear whether a committee could reach a consensus on the proposed rule within a fixed period of time.

Criteria (5) whether the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule: Given the number of granted petitions, the wide variety of stakeholders, and the number of applications at issue, seeking to

¹⁰ For a list of comments received on petitions, see “NODA Comments” at www.regulations.gov, under Docket ID EPA-HQ-OAR-2021-0643. These comments were originally submitted to Docket ID EPA-HQ-OAR-2021-0289.

identify and convene a negotiated rulemaking committee and following other provisions under the Negotiated Rulemaking Act of 1990, such as publishing a list of potential committee members and awaiting public comment on this list, would likely cause delay in proposing and finalizing a rulemaking in the timeframe provided by the statute.

Criteria (6) whether the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee: If the determination here or in the future is that a negotiated rulemaking is appropriate, then EPA would take steps to commit resources, including technical assistance to a committee.

Criteria (7) whether the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment: Should the Agency decide to use negotiated rulemaking procedures now or in the future, the Agency would propose rules for notice and comment consistent with language developed by the negotiated rulemaking committee.

V. EPA's Decision Not to Use the Negotiated Rulemaking Procedure

We have considered the information provided by petitioners and the criteria listed in section 5 U.S.C. 563 of the Negotiated Rulemaking Act of 1990. In our assessment, using the negotiated rulemaking procedure to develop the proposed rule or rules associated with the eleven AIM Act petitions at issue is not in the public interest. For these eleven petitions, we do not think the negotiated rulemaking procedure for identifying, nominating, and taking comment on a relatively limited group of interested parties would be beneficial to reaching consensus given the potential breadth and scope of the rule or rules associated with the eleven petitions. The Agency would be able to reach a broader audience through other means than it would using the negotiated rulemaking procedure. For example, we could conduct stakeholder meetings prior to the proposal of a rule to solicit early feedback and additional information from stakeholders directly; using a negotiated rulemaking committee could limit the feedback EPA receives to

members of the negotiated rulemaking committee, and because the procedure favors nominating individuals to represent certain interests, the procedure could result in failing to capture the nuances of similarly situated but not identical interests. In addition, the Agency views the regular notice-and-comment rulemaking process on its own as providing robust public engagement avenues that will allow for all interested stakeholders to provide input and represent their interests to EPA. Based on these considerations, the Agency has decided not to use a negotiated rulemaking procedure for the rule or rules associated with the eleven petitions under subsection (i) of the AIM Act.

Michael S. Regan,

Administrator.

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